clearly proceeded to consider the facts as a whole. Their conclusions were drawn from the facts that were neutral in themselves except that they, to use the words of Lord Radcliffe at page 36 in *Edwards* v. *Bairstow, supra,* ".... take their colour from the combination of circumstances in which they are found to occur."

For the reasons that I have stated I would therefore confirm the Special Commissioners' findings and dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

NATIONAL ELECTRICITY BOARD EMPLOYEES UNION v. R. BALAN @ RAJA GOPAL

[A.C.J. (Wan Suleiman J.) April 19, 1974]
[Kuala Lumpur — Civil Appeal No. 29 of 1973]

Employment — Contract of service — Medical leave with full pay — Entitlement to — No express term — Whether implied term.

The respondent was employed under a contract of service by the appellants. The appellants had at various times granted the respondent medical leave on full pay, but had made such payments upon specific requests and with the special consent of the executive committee of the appellants' union. Approval had to be obtained before various periods could be treated as full pay periods. The respondent who had a long history of ill health which was known to the appellants gave notice of resignation whilst on medical leave. The appellants stopped his salary and the respondent commenced an action. The learned Senior President gave judgment for the respondent and the appellants appealed.

Held: (1) the appellants had established that wages were not payable during illness as a matter of right and therefore the appeal must be allowed;

(2) as the respondent had remained in the employ of the appellants until the expiry of the notice he was entitled to recover the medical expenses.

Case referred to:-

(1) *Orman* v. *Saville Sportswear Ltd.* [1960] 3 All E.R. 105 at p. 111.

CIVIL APPEAL.

F. Goonting for the appellants.

D. Puthucheary for the respondent.

Wan Suleiman J.: This is an appeal against the decision of the learned Senior President, Sessions Court, Kuala Lumpur in which he gave judgment for the respondent.

The respondent had by agreement dated 16th October, 1968 (Exhibit P1), with the appellants agreed to serve as the appellants' Union Executive Secretary for five years at a salary of $500 per month with effect from 1st December, 1968. On 25th September, 1972, the respondent gave appellants six months' notice of resignation in accordance with clause 14 of the Agreement to take effect from 1st October, 1972. In the meanwhile, from 15th September, 1972 the respondent claimed to be on medical leave, saying that a medical certificate had been submitted to the appellants. He said that at the time he gave notice on the 25th of September, 1972, he was on medical leave. His witness, Dr. Sundram, did mention that he had come to consult him in September, 1972, and since the appellants do not appear to dispute this claim, it would be safe to assume that he was indeed on medical leave at least from that date, and it would also appear that such leave was approved by the appellants for he was paid full salary from September 1972.

In any case. he subsequently obtained medical certificates covering a period of six months commencing on 23rd October, 1972 and terminating on 22nd April, 1973, during which period he did not turn up for work.

The respondent claimed six months' salary from 1st October, 1972 and one-third of the medical fees incurred by him in accordance with the Agreement.

The appellants denied he was entitled to the salary for that period, contending that —

(a) he had not turned up for work during the relevant period; and

(b) that he had engaged in business other than that of the appellants/defendants, in breach of Clause 9 of the Agreement.

The appeal before me was argued on that basis.

I shall consider the issue (b) first. I am inclined to agree with the learned Senior President that despite the fact that the respondent had himself admitted to having assisted in a small way at the Sharikat Pioneer Commercial Agency, for which he was paid small sums, which were more in the nature of gifts, such activities did not amount to a breach of Clause 9 of the Agreement.

The success or failure of this appeal will therefore rest on the remaining issue, *i.e.* was he entitled to be paid during the period he had not turned up for work? The Agreement is silent as to whether he had the right to claim his salary during absence from work on account of illness.

That there was illness such as to justify medical leave for the full period of six months granted to him by Dr. Sundram, there was ample evidence which the learned Senior President accepted. Indeed, the appellants were well aware of the respondent's state of chronic ill-health for some years before they entered into the agreement with him in 1968. I would therefore with respect agree with this finding of the learned Senior President. The question is whether he is entitled to be paid during such period.

In paragraph 728 of Chitty on Contracts, Vol II, 23rd Ed., appears the following passage:

"The right of the employee to claim his salary or wages during his absence from work on account of his illness or injury depends on the terms of his contract. If no express term deals with the matter, the court must attempt to infer an implied term from all the relevant circumstances."

In *Orman* v. *Saville Sportswear Ltd.*,[1] an authority which was considered by the learned Senior President, it was held that —

"Where the written terms of the contract of service are silent as to what is to happen in regard to the employee's right to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer seeks to establish an implied condition that no wages are payable, it is for him to make it out, and the court, in construing the written contract, will not accept any implied term which will not pass the test laid down by Scrutton, L.J. in *Reigate* v *Union Manufacturing Co. (Ramsbottom)* ([1918] 1 K.B. at p. 605).

The learned Senior President did not say in so many words that he considered it an implied term that the respondent was entitled to be paid during illness. Indeed he found that "there was no implied term as explained in *Orman's* case". However, in holding that the plaintiff was to be paid in the event of his being ready and willing to work, rather than for actual work done, it would appear that in his view there was indeed such a term implied. It is indeed unfortunate that the facts on which this finding was based had not been set out.

I therefore propose to examine the facts in some detail.

Before his appointment under the Agreement, the respondent was a part-time clerk with the appellants. During this period, the appellants were already aware of the respondent's ill-health. In a letter dated 4th October, 1967 sent by the General Secretary (DW2) of the Union to him, the respondent was refused permission to resign, and the General Secretary was then authorised to grant him leave during periods of ill-health, obviously on full pay, if as the former said, such leave was for periods which are "not too long."

On 18th December, 1967 and 29th January, 1968, the respondent again sent in his resignation to which P9 dated 6th February, 1968 is the reply. Again the Union Executive Committee asked the respondent to continue working, and noting his ill-health, gave him three months' medical leave on full pay, on condition that he was to be on call to deal with important work. Letter (Exhibit P10) dated 3rd July, 1968 again recorded a refusal by the Union Executive Committee to allow him to terminate his services, but again he was given three months' full pay medical leave on the same conditions as before.

These occasions clearly showed that pay during such lengthy periods of medical leave was conditional on the Union's approval, as distinct from short-term medical leave where the General Secretary (DW2) was the authority who could grant paid leave. The common feature of both extended periods, and shorter spells of leave during illness was that the approval of someone in authority had apparently to be obtained before such periods could be treated as full pay leave periods. It is strange that the respondent did not assert that he was given full pay leave on certain other occasions he had to absent himself because of illness. He mentioned two trips to India for medical treatment for hypertension and three occasions when he was in the General Hospital here. Of these two trips to India, he said they were in December 1970 and December 1972.

In September 1972, he gave six months' notice, as required under the Agreement, of resignation to be with effect from 1st October, 1972. This time the appellant Union accepted his resignation. It would appear from 15th September, 1972, as I have earlier mentioned, that he was already on medical leave, and though the medical certificates are not very clear as to when the next one was issued (D6 gives the commencing date as 23rd October, 1972), the doctor who issued them, PW2, said that he had asked the respondent to take complete rest for six months from 1st October, 1972.

The respondent was paid for September, 1972, but payment of salary ceased from 1st October, 1972. The respondent was uncertain about how many medical certificates he had submitted to his employer during such period, but thought that he submitted two and did not send in the others because he had not received any reply from the Union. The General Secretary, however, said that he had received only the first one — D6 (from 23rd October, 1972) — but the respondent had not turned up for work from 1st October, 1972.

It would appear that for periods prior to the signing of the Agreement, particularly after the General Secretary's letter of 4th October, 1967 (Exhibit P8), the respondent was paid during such period of indisposition on the approval of the General Secretary. It may be argued that for longer periods, as happened on the two occasions in 1968, the Union's approval had to be obtained before full pay medical leave for three months on each occasion was granted.

I have noted, however, that on both these two occasions, the respondent had not asked for medical leave, but had given notice of resignation, and instead, such full pay leave was granted in order to retain his services because he was known to be ill.

His treatment in India in December, 1970, which must have taken more than a few days, was not denied by the appellants, and it will be fair to assume that it was with their approval and on full pay. This happened within the period of the present Agreement. The appellants were therefore fully aware that Balan had for some years before the execution of the Agreement in October, 1968 been suffering from that incurable, though not necessarily fatal, malady of old age — hypertension. Indeed his two extended periods of medical leave that very year must have heightened this awareness.

Applying the test laid down by Scrutton, L.J. in *Reigate's* case, it must be abundantly clear that though payment of wages had never been withheld before, such payments were a matter of grace and favour, and for considerably shorter periods than six months. In short, the employers (appellants) have in my judgment established that wages are not payable during illness as a matter of right. This is further emphasized (though they were ostensibly made in order to retain the services of the respondent) in that for two periods of three months' full pay such leave was, shortly before the Agreement was signed, granted only by special approval of the Union's Executive Committee. The appellants must therefore succeed on this major issue.

The respondent, however, remained in the employ of the appellants until the expiry of the notice at the end of March 1973, and is therefore entitled to recover 1/3 of his medical fees (by which I think is meant medical expenses incurred by him) under Clause 17 of the Agreement up to the end of that month, *i.e.* the sum of $46 claimed in paragraph 9 of the Statement of Claim.

Since the appellants have succeeded on the major issue, they shall have the costs of this appeal.

Order accordingly.

Solicitors: *Aljeffri & Ooi; Skrine & Co.*